INDEX

	Page
QUESTIONS PRESENTED	1
INTEREST OF AMICUS CURIAE	2
ARGUMENT	3
CONCLUSION	11

CITATIONS

CASES:

Airline Dispatchers Association v. National Mediation Board, 89 App. DC.24 189 F 2d. 685, Certiorary denied, 342 U.S. 849	10
Bennett v. Arizona State Board of Public Welfare, (1963) 95 Ariz. 170, 388 P.2d 166	12
Ferry v. Udall, 336 F.2d 706 (9th Cir.)	5, 8, 9
Guardian Life Insurance Co. v. Bohlinger, 308 N.Y. 174, 124 NE.2d 110, Rehearing denied, 308 N.Y. 810, 125 NE.2d 876	10
Panama Canal Co. v. Grace Lines, Inc., 356 U.S. 309	9
Twining v. New Jersey, 211 U.S. 78	11
U.S. v. Waddell, 112 U.S. 76	11
Wei v. Rollins, 246 F.2d 739	11

STATUTES & REGULATIONS: *Page*

Taylor Grazing Act:
Sec. 7, 43 U.S.C. 315(f) 1, 4, 5, 6, 7, 8, 10, 11

Sec. 14, 43 U.S.C. 1171 ..... 1, 5

Administrative Procedure Act:
5 U.S.C. 1009 ..... 2, 8

Regulations:
43 C.F.R. 250.5 ..... 6, 7, 10

43 C.F.R. 250.11 ..... 6, 7, 10

43 C.F.R. 250.12 ..... 6, 7, 8, 10

MISCELLANEOUS:

Black's Law Dictionary, 4th Ed. 4, 6

Glossary of Public Land Terms, 1949, USDI BLM. 4, 5, 6

U.S. Congressional Service, 80th Congress, 1st Session, 1946, Page 1510 5

Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946) 10

73 CJS. Public Lands, Sec. 36, page 685 11

Webster's Third New International Dictionary, Unabridged Edition, page 1141 11

42 Am.Jur. Public Lands, Sec. 20, page 799 11

16 Am.Jur.2d. Sec. 483, page 842 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

ROBERT V. FERRY, IRVING BAKER, and AUTRICE COPELAND FREEMAN, PETITIONERS,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR ET AL, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICUS CURIAE ON BEHALF OF GUST, ROSENFELD & DIVELBESS and HOLMAN & LEWIS URGING THAT A WRIT OF CERTIORARI ISSUE

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the land disposal laws of the United States, specifically The Taylor Grazing Act, and to the administrative procedure of the Department of the Interior in land disposal cases. The questions presented necessarily include the following:

1. Whether an applicant to purchase land under Sections 7 and 14 of The Taylor Grazing Act (Act of June 28, 1934, c. 865, 48 Stat. 1272, and Act of June 28, 1934, c. 865, 48 Stat. 1274, now appearing as 43 U.S.C. 315 (f) and 43 U.S.C. 1171), has any rights prior to the issuance of a cash certificate.

2. Whether or not disposal, as distinguished from classification, of lands under the cash entry system of The

Taylor Grazing Act, specifically Sections 7 and 14 of said Act, are so committed to agency discretion as not to be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946 c. 324, 60 Stat. 243, which now appears as 5 U.S.C. 1009).

INTEREST OF AMICUS CURIAE

The amicus curiae represents a Perley M. Lewis and Mildred C. Lewis, his wife, in litigation presently before the District Court for the District of Arizona, in cause No. CIV, 5451, PHX entitled "Perley M. Lewis and Mildred C. Lewis, his wife, vs. Stewart L. Udall, et al". The Lewis's situation is comparable to the situations of Baker, Freeman and Ferry in the appeal here presented.

On April 25, 1956, a lawful application was made in the Phoenix, Arizona Land Office, Bureau of Land Management, for the sale at public auction of an isolated tract of public domain, pursuant to Sections 7 and 14 of The Taylor Grazing Act. Said sale was held and the high bidder was declared. Thereafter, within the 30-day period allowed by law for applications of adjoining land owners, such applications were filed and the full bid price paid by the applicants.

On January 25, 1960, the preference right applicants filed an agreemnet at the Land Office agreeing on a division of the land. All other procedures and requirements under the rules and regulations were met and by January 25, 1960 the parties had done everything required of them under the law and regulations then existing to purchase the land. The only remaining thing to be done being the ministerial act of the manager in directing the issuance of cash certificate and patent. This the manager failed to do for over five months, and on June 6, 1960, the acting manager vacated the previous decision of De-

cember 4, 1959 and vacated the sale held on November 3, 1959 and rejected all applications. The basis for this action was on the grounds of a new general policy issued by the Secretary of the Interior on February 23, 1960 and for no other reason.

An appeal was made by two of the applicants successfully to the Director, but only the Lewises appealed to the Secretary, thus, the Lewises were the only ones having a claim to the subject land which was sold.

Without going into the details of the appeals or the grounds thereof, at this point it is enough to state that the Secretary finally issued his final decision on December 20, 1963, over four years after the sale in 1959.

In essence, the decision of the Secretary was for no other reason except that he had changed his mind and changed his policies.

Appeal was then made under the Administrative Procedure Act to the District Court for the District of Arizona, on March 12, 1965. The basic questions involved are similar to the legal issues presented in this appeal.

ARGUMENT

The appellants in this case, as well as the State of Arizona, in its Brief of Amicus Curiae, have stated good reasons for granting of the Writ of Certiarori in this case, and this Amicus Curiae hereby supports their positions.

This Amicus Curiae feels that the determination of the Circuit Court in this cause emasculates the purpose and intent of The Taylor Grazing Act for the orderly disposal of surplus Federal land within the several states.

I RIGHTS OF APPLICANTS UNDER SECTIONS 7 and 14 OF THE TAYLOR GRAZING ACT.

As has been pointed out by appellants herein, and the State of Arizona, disposal of land pursuant to Section 14 of The Taylor Grazing Act, commonly known as the Isolated Tracts Act, is controlled by other provisions of The Taylor Grazing Act, specifically Section 7 thereof (43 U.S.C. 315 (f)).

Section 7 of The Taylor Grazing Act provides in part as follows:

> "... Upon the application of an applicant qualified to make entry selection or location under the *Public Land Laws* and filed in the Land Office of the proper District, the Secretary of the Interior *shall* cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, *shall* entitle the applicant to a *preference right* to *enter*, select or locate such land, if open to entry as herein provided." (Emphasis supplied)

Therefore, rights do accrue once the application of the proper person or entity is approved. This right is a "preference right to enter".[1] What is this right of entry? "Entry" as used in the Public Land Laws, covers all methods by which a *right to acquire title* to public lands may be initiated.[2]

According to the Glossary of Public Land Terms, put out by the Department of the Interior, an entry is defined as follows:

> "In general, an allowed application which was submitted by an applicant who *will* acquire title to the land by *payment of cash* or its equivalent and/or by entering upon and improving the land."[3]

---

[1]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f)

[2]Black's Law Dictionary, 4th Ed., page 627

[3]Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

Therefore, this "preference right to enter"[4] is a preference right to "acquire title to the land by payment of cash or its equivalent".[5]

Can the pursuit of this right be denied by the Secretary by arbitrary action on his behalf or without reason?

It was the position of the Secretary, and the court below, that this right could be denied. The argument was that the Isolated Tracts Act[6] did not specify the procedure to be followed in selling said tracts. This position was adopted by the court below.[7]

The adoption of this argument by the court below, completely ignored the fact that the Isolated Tracts Act is an integral part of The Taylor Grazing Act. In fact, the main purpose of Section 14, which is a later amendment to The Taylor Grazing Act, is to allow the Secretary to sell at public auction certain lands not exceeding 1,520 acres, which, in his judgment, would be proper to *expose* for sale.[8]

In reaching this conclusion, the appellees, and the

---

[4]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f),

[5]Glossary of Public Land Terms, 1949, USDI, BLM, page 3,

[6]Section 14, The Taylor Grazing Act, 43 U.S.C. 1171,

[7]Ferry v. Udall et al.

[8]Section 14, The Taylor Grazing Act, 43 U.S.C. 1171; U.S. Code Congressional Service, 80th Congress, 1st Session, 1946, page 1510:

"There are tracts of public lands of over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises there is no use holding them for homesteaders because, if they had been suitable, they would have been homesteaded years ago, and, being isolated, they often are not so situated that they can be included in the land program."

lower court, rely heavily upon one particular regulation of the Secretary.[9]

Appellees urge that this regulation allows the authorized officer, at any time before the cash certificate is issued, to determine, *for any reason he sees fit*, that the land should not be sold and that this determination is not subject to review by the courts.

Such an interpretation effectively nullifies the meaning of a "preference right to enter" given by Section 7 of The Taylor Grazing Act.[10] Further, it nullifies the meaning of other regulations under this same section.[11]

These regulations are quite specific in stating what rights accrue to a proper applicant and what the Secretary should do as a mechanical procedure of the sale to grant this. For example, 43 C.F.R. 250.11 says in part:

> "(a) Declaration of high bidder.
>
> "When all persons present shall have ceased bidding, the manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchasers or owners of contiguous land . . . , announce the amount of the highest bid and declare the offeror thereof . . . the *highest bidder*, provided that the buyer immediately pays to the manager the

---

[9] 43 C.F.R. 250. 5
"Effect of Application. The filing of an application in conformity with the regulations of this part, will not segregate the lands applied for from any other application under The Public Land Laws, or defeat a prior valid right initiated under such law. However, until the issuance of a cash certificate, the authorized officer may, at any time, determine that the land should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States."

[10] 43 U.S.C. 315 (f); Black's Law Dictionary, 4th Ed., page 627; Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

[11] 43 C.F.R. 250. 11; 43 C.F.R. 250. 12 (c)

amount of the bid, if he has not already done so . . . ."
"(4) If, by the end of the preference right period, no preference right has been asserted, the *sale will be declared closed* and the manager may declare the highest bidder the *purchaser*". (Emphasis supplied)

Regulation 43 C.F.R. 250.12(c) states as follows:

"When there has been full compliance with the regulations on his part, the manager *will* issue a cash certificate to the purchaser." (Emphasis supplied)

Keeping the "preference right to enter",[12] granted by statute, in mind, together with the Secretary's own regulations,[13] as quoted above, there would appear to be only one logical interpretation of 43 C.F.R. 250.5, and that interpretation is contrary to that of the lower court.

This regulation, 43 C.F.R. 250.5, allows the authorized officer, at any time prior to the issuance of a cash certificate, to "determine that the land should not be sold".

The question is, in the light of the statutes and regulations, on what basis may this determination be made?

By making such determination, the authorized officer is acting in a judicial capacity. Courts may make determinations in determining matters, but not for any reason they deem fit. Their determination must be based on some sound reasoning and must be based upon proper procedure. What the government is saying is that the authorized officer under this regulation can ignore the fact that he *will* issue a cash certificate if certain things are done, and that the sale *will* be closed and the highest bidder *will* be declared the highest purchaser after certain acts have been performed.[14]

The only logical construction of 43 C.F.R. 250.5 is that

---

[12]Section 7, The Taylor Grazing Act; 43 U.S.C. 315(f).

[13]43 C.F.R. 250.11; 43 C.F.R. 250.12(c).

[14]43 C.F.R. 250.11 and 43 C.F.R. 250.12

the authorized officer may "determine" that the land will not be sold for failure of proper performance of conditions subsequent under the regulations,[15] or because of fraud or mutual mistake. To hold otherwise would be to say that the authorized officer may determine that the land should not be sold for any reason he sees fit, something which is not indicated by the regulations, and such a construction would also deny the "preference right to enter" granted under Section 7 of The Taylor Grazing Act.[16]

II. THE DETERMINATIONS OF THE SECRETARY AND HIS AUTHORIZED OFFICERS ARE REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Section 10 of The Administrative Procedure Act prohibits judicial review of agency action by a law committed to agency discretion,[17] but goes on to say in the same section as follows:

> "Scope of review — So far as necessary to a decision, where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) *arbitrary, capricious and an abuse of discretion*, or otherwise not in accordance with law; . . . ." (Emphasis supplied)

It was the position of the appellees and the court below, and this position was adopted by the Circuit Court, that the acts of the Secretary and his authorized officers were not subject to judicial review.[18]

---

[15] 43 C.F.R. 259. 12

[16] 43 U.S.C. 315 (f)

[17] 5 U.S.C. 1009

[18] *Ferry v. Udall.*

In reaching this result, the lower court decided that the Secretary's decision was so committed to his discretion that it was not reviewable.[19]

The court cited *Panama Canal Co. v. Grace Lines, Inc.*[20] which was a case where the court decided it would not review toll rates set by the *Panama Canal Co.* because toll rate adjustments were a matter left to the discretion of the company. It was determined by the court in that case that the decisional process was committed to the company's discretion because it involved ". . . matters upon which experts may disagree; they involve nice issues of judgment or choice, which require the exercise of informed discretion."[21]

The court went on to say that this rule applied to the case at hand and said: "Similarly, a decision of whether or not it would be in keeping with sound policy to sell a particular parcel of land at a certain offered price involves the exercise of informed discretion."[22]

It appears that the court is confusing the classification of what land is suitable for disposal with the procedure after a qualified application has been allowed and the applicant has a preference right to enter, which is the case at hand.

There is no doubt that whether or not land is suitable for sale involves nice issues of judgmet and choice which require the exercise of informed discretion. But it is extremely doubtful and even dangerous to say that procedure to be carried on after this determination has been made, involves nice issues. Is the Secretary or his au-

---

[19]Ibid.

[20]356 U.S. 309

[21]Ibid.

[22]*Ferry v. Udall.*

thorized officer determining "nice issues" when he refuses to give a notice or hearing as to reappraisals made years after initial appraisal for the sale of the land? Is he determining "nice issues" when he unilaterally determines that he made a bad bargain by the initial sale? Is he determining "nice issues" when he arbitrarily refuses to recognize a previous order of his authorized officer made two years previously, that the sales were final and that the applicants were the purchasers of the land? Is he determining "nice issues" when he determines whether or not conditions subsequent to the sale as provided in the regulations have been performed?[23]

The courts are exceedingly slow to rule that a statute precludes all judicial review.[24] The legislative intent to forbid judicial review must be clear and convincing and unmistakable.[25]

Are we to say that under a single regulation which says that any time prior to the issuance of cash certificate, the authorized officer may "determine" that the land should not be sold,[26] gives him the right to make such a determination, arbitrarily, without good reason or cause and thus to deny the applicant's preference right to enter under statute?[27]

---

[23]43 C.F.R. 250. 11; 43 C.F.R. 250. 12.

[24]*Guardian Life Insurance Co. v. Bohlinger*, 308 N.Y. 174, 124 NE.2d 110 Rehearing denied, 308 NY. 810, 125 NE2d, 876; *Airline Dispatchers Association v. National Mediation Board*, 89 App. D.C. 24, 189 F.2d 685, Certiorari denied. 342 U.S. 849, 96 L.Ed. 641, 72 Sup. Ct. 77.

[25]Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946)

"To preclude judicial review under this bill, a statute, if not specific in withholding review, must upon its face give clear and convincing evidence of intent to withhold it."

[26]43 C.F.R. 250. 5

[27]Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f)

Where rights are involved, there should be no arbitrary denial of such rights. The term "entry" in the technical sense, means that act by which an individual acquires an *inceptive right* to a portion of the unappropriated soil of the country by filing his claim.[28] An "inceptive right" is an inchoative right.[29] This is to say that the applicant has a legal right not yet perfected, but a right nevertheless.

The right to enter public lands, when granted by statute, is one of the constitutional privileges of citizenship.[30]

Section 7 of The Taylor Grazing Act[31] gives the statutory right to an applicant whose application has been approved by the Land Office. This inchoate right, which is a constitutional right, should not be denied by arbitrary action of the Secretary and such action should be reviewable.

CONCLUSION

As was said by the Second Circuit in the case of Wei v. Rollins:[32]

> "The legislative process would completely bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefor fixes a point beyond which it is unreasonable and impractical to impell Congress to prescribe detailed

---

[28]73 C.J.S. Public Lands, Sec. 36, page 685

[29]Webster's Third New International Dictionary, Unabridged Edition, Page 1141.

[30]42 Am. Jur., Public Lands, Sec. 20, page 799; 16 Am. Jur.2d, Sec 483, pg. 842; *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 Sup. Ct. 14; *U.S. v. Waddell*, 112 U.S. 76, 28 L.Ed. 673, 5 Sup. Ct. 35.

[31]43 U.S.C. 315 (f)

[32]1957, 246 F.2d 739.

> rules; it then becomes constitutionally sufficient if Congress clearly determines the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of the legislative declarations.*"

It is the position of this Amicus Curiae that under the disposal section of The Taylor Grazing Act, a right does exist, to-wit: the right to enter. That this is a constitutional right which cannot be interfered with without due process of law. To allow the Secretary or any administrative agency to do away with the constitutional right, without some form of review for arbitrariness or unreasonableness, is a violation of this constitutional right.

The case of Bennett v. Arizona State Board of Public Welfare, (1963), 95 Ariz. 170, 388 P2d 166, is analogous to the situation at hand. Under a constitutional provision similar to the Federal Constitution, the court held that a statute allowing certain controls over the right to engage in the business of operating a nursery was unconstitutional in that it did not provide for judicial review of the department's judicial decisions. In that case, the court stated:

> "We observe, as did the United States Supreme Court, that the multiplication of administrative agencies and the expansion of their functions to include adjudications, which have serious impact on prior rights, has been one of the most dramatic legal developments of the past one-half century. *Wong Yang Sun v. McGrath*, 339 U.S. 33, 70 Sup.Ct. 445, 94 L.Ed. 616. While a state may bestow upon an administrative officer or administrative agency the duty to protect the public health, safety and welfare by examining into the fitness of an individual to engage in an occupation, it cannot exclude such person from any occupation in a manner or for reasons that

contravene the due process clause of the Fourteenth Amendment. *Schwere v. Board of Bar Examiners*, 353 U.S. 232, 77 Sup. Ct. 752, 1 L. Ed.2d, 796.

"It is too well settled, to permit any argument to the contrary, that procedural due process requires petitioner be given an opportunity to be heard upon the matters which the Board of Welfare acted in denying the license. See *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 46 Sup. Ct. 215, 70 L. Ed. 494."

Since the right to enter on public lands as granted by statute is a constitutional right, the same protection from arbitrariness of administrative decisions should be given the person who had such a right.

The power of the Department of the Interior in these matters must be delineated. The court should rule once and for all whether or not a person entering upon public land under The Taylor Grazing Act has a right or a preference right to enter and whether or not that right is protected by the Constitution.

It should also determine whether or not the procedure followed by the Secretary in processing that right is subject to judicial review for being arbitrary or unreasonable.

The decision in this case will not only affect the private litigants involved and the clients of this Amicus Curiae, but will affect the State of Arizona and all of the western states in their acquisition of lands of public domain.

Therefore, the Writ of Certiorari should issue.

Respectfully submitted,

GUST, ROSENFELD & DIVELBESS
AND
HOLMAN & LEWIS
By: James R. Holman